

Elizalde Ruiz (Migration) [2023] AATA 1001 (12 April 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Carlos Eugenio Elizalde Ruiz
REPRESENTATIVE:	Mr Roman Deauna (MARN: 0634853)
CASE NUMBER:	1823908
HOME AFFAIRS REFERENCE(S):	BCC2017/998701
MEMBER:	Edward Howard
DATE:	12 April 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • reg 2.03A

Statement made on 12 April 2023 at 9:41am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – financial, household and social aspects of relationship and nature of commitment – development and length of relationship and registration – extensive documentary evidence and supporting statements – decision made without hearing necessary – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

Ally v MIAC [2008] FCAFC 49
He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 14 March 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211.
4. The Tribunal has considered all of the evidence, which includes extensive documentary evidence provided to the Tribunal and is satisfied that a decision can be made without the need for a hearing.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The visa applicant is Carlos Eugenio Elizalde Ruiz, 35 years of age, a citizen of Mexico. The sponsor is Gregory George, 46 years of age, an Australian citizen. The parties claim to have met via a mobile dating application on 26 April 2014. The sponsor was visiting Auckland to attend the wedding of friends. The parties met in person for the first time on 26 June 2014. They met again in Auckland between the 20th and 24th of August 2014. The visa applicant then travelled to Sydney to spend time with the sponsor on 19 September 2014. The parties then met in both Auckland and Sydney over the following few months and in January 2015 agreed to develop their relationship on a more long-term basis.
9. The sponsor then committed to visiting Auckland more regularly as he had the flexibility to work from his employer's office in Auckland. His employer gave approval for him to work one full week every month out of the Auckland office. During 2015 the visa applicant also visited the sponsor in Sydney. The visa applicant then made a decision to undertake a course of study, an accounting diploma, in Sydney and relocated there, living with the sponsor. Eventually, the relationship developed on a more permanent basis and they registered their relationship on 17 December 2015.

10. Issues And Law

11. There is a two stage process for onshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.

12. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.09A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹ The Tribunal observes this to be a matter where the visa applicant submitted limited documentary evidence in support of his visa application to the Department of Home Affairs and then furnished the Tribunal with further evidence that was unavailable to the primary decision maker.

Whether the parties are in a spouse or de facto relationship

13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

14. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
15. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

16. Proof of De facto Relationship

17. The parties entered into a civil partnership and provided the Tribunal with a copy of their Relationship Certificate dated 17 December 2015. On the evidence, the parties were in a de facto relationship that was valid for the purposes of the Act as required by s 5CB(2) at the time of the application for a visa.

18. Are the other requirements for a de facto relationship met?

- *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*
19. After the visa applicant arrived in Sydney, he struggled to find part-time employment under his student visa. As a result, it was agreed that the sponsor would pay for all household

¹ *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it 'tends to logically show the existence or non-existence of' the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

costs so that the visa applicant could focus on his studies. The visa applicant eventually found a part-time job which he maintained whilst studying.

20. After completing his studies in 2017, the visa applicant obtained a full-time position in an accounts payable office in December 2017. The parties agreed that the visa applicant would contribute 30% of his salary towards rent and household expenses. The parties also agreed to share weekly grocery shopping and general social costs.
21. The parties have provided an extensive history of their financial relationship including full details of their National Australia Bank accounts, identifying transfers between them and expenses paid by each party. The evidence of the parties is that they pool their resources for their day-to-day household expenses.
22. The documents provided to the Tribunal are consistent with the evidence of the parties that they continue to pool their resources, pay joint expenses and support each other financially.
23. On the evidence, the Tribunal is satisfied that parties have a strong financial relationship. The Tribunal is satisfied that the parties pool their financial resources in relation to their expenses and savings and is satisfied that they share the normal daily expenses. The Tribunal weighs the financial aspects of the relationship in favour of the visa applicant.
 - *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*
24. The evidence of the parties is that they commenced a relationship in 2014 and that it developed over a period of time, with the visa applicant eventually relocating to Sydney for study purposes and the parties committing to a permanent relationship, which they registered, on 17 December 2015.
25. During their time living together, the parties have shared the housework and regular household duties. In particular, the sponsor undertakes most of the cooking but the party share most of the domestic duties including housework, laundry and cleaning.
26. The Tribunal places weight on the parties' living arrangements, based on the evidence that they lived together from late 2015 until the present time. The Tribunal is satisfied that the parties household and living arrangements are consistent with that of a de facto couple in a genuine relationship. Based upon the evidence received, the Tribunal weighs the household aspects in favour of the visa applicant.
 - *Social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*
27. The parties have provided extensive evidence supporting their claim of being in a genuine relationship. The evidence demonstrates the clear recognition by family, friends and colleagues, recognising the parties as a genuine couple over a period of approximately eight years. The Tribunal places weight upon the statements in support provided and in particular, the Tribunal refers to the following statements:
 1. Hamish Bevan dated 6 September 2022;
 2. John Cacciola dated 6 September 2022;
 3. Paul Sherriff dated 5 September 2022;

28. The parties also provided extensive photographic evidence of their social interaction.
29. The Tribunal is satisfied on the evidence that the parties represent themselves to other people as being in a long-term and genuine de facto relationship, that they hold the favourable opinion of family, friends and acquaintances about the nature of their relationship and that they regularly plan and undertake joint social activities. The Tribunal weighs the social aspects of the relationship in favour of the visa applicant.
 - *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*
30. The visa applicant is Carlos Eugenio Elizalde Ruiz, 35 years of age, a citizen of Mexico. The sponsor is Gregory George, 46 years of age, an Australian citizen. The parties first met via app in April 2014, eventually meeting in person for the first time on 26 June 2014. They met again in Auckland in August 2014 and in Sydney during September 2014. The parties then met in both Auckland and Sydney over the following few months and in January 2015 agreed to develop their relationship on a more committed basis. Eventually, the relationship developed on a more permanent basis and they registered their relationship on 17 December 2015.
31. The parties have provided the Tribunal with extensive evidence as to the genuineness of the relationship, the social acceptance of each of them with their families and friends and their commitment as a couple. The parties have travelled extensively and have spent time with family members and friends in various locations.
32. From the evidence provided, the Tribunal finds that the parties are in a genuine and continuing relationship, show a strong commitment to each other, provide significant emotional support to each other and clearly see the relationship as long-term. The Tribunal weighs the nature of the commitment in favour of the visa applicant.

33. **Overall Conclusions**

34. Having considered the evidence and for the reasons above, the Tribunal is satisfied that at the time of application, the parties had a mutual commitment to a shared life to the exclusion of all others; that the relationship between them was genuine and continuing; and that they lived together and not separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5CB of the Act were met the time of the visa application.
35. The Tribunal is further satisfied that at the time of this decision the parties continue to have a mutual commitment to a shared life to the exclusion of all others and that the relationship between them has been and remains, genuine and continuing. The Tribunal is also satisfied that the parties live together and not live separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5CB(2) of the Act are met at the time of this decision.
36. The Tribunal is therefore satisfied that the parties relationship fulfilled the criteria contained in clause 820.211(2)(a) of the regulations at the time the visa application was made and at the time of this decision.
37. The Tribunal is satisfied that at the time of the application, the visa applicant was sponsored by the sponsor in accordance with cl.820.211(c), who lodged a sponsorship in support of the application. The Tribunal is satisfied that at the time of this decision the visa applicant continues to be sponsored by his sponsor. The Tribunal is further satisfied that at the time of

this application, the visa applicant was the holder of a substantive visa in accordance with cl.820.211(d) and that he continues to meet that subclause at the time of this decision.

38. Pursuant to clause 820.221(1), in order to be eligible for the grant of a subclass 820 (UK) visa, the visa applicant must also continue to meet the requirements of clause 820.211(2) at the time of this decision. Having regard to the evidence before the Tribunal, the Tribunal is satisfied that the visa applicant continues to meet the requirements of clause 820.211(2), hence satisfying the criteria in clause 820.221.
39. Therefore, the Tribunal finds that the visa applicant meets the requirements of clauses 820.211(2) and 820.221.

Are the additional criteria for a de facto relationship met?

40. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the visa applicant and the sponsor were at least 18 years old.
41. The visa applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
42. The visa applicant has provided evidence that the relationship is registered under the Births, Deaths and Marriages Registration Act 1995 (NSW) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: reg 2.03A(5). Accordingly, the 12 month requirement does not apply.
43. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
 - reg 2.03A

Edward Howard
Member

46.

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).